SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
AUG 5 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-58

CLYDE ORTON,
Petitioner,

vs.

THE STATE OF MISSOURI, ON INFORMATION OF JOHN C. DANFORTH, ATTORNEY GENERAL,
Respondent.

ON PETITION FOR CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF OF RESPONDENT IN OPPOSITION

JOHN C. DANFORTH
Attorney General
Supreme Court Building
Jefferson City, Missouri 65101
CHARLES B. BLACKMAR
Special Assistant Attorney General
7305 Maryland Avenue
St. Louis, Missouri 63130
Attorneys for Respondent

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-58

CLYDE ORTON,
Petitioner,

vs.

THE STATE OF MISSOURI, ON INFORMATION OF JOHN C. DANFORTH, ATTORNEY GENERAL,
Respondent.

ON PETITION FOR CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF OF RESPONDENT IN OPPOSITION

OPINION BELOW

An opinion in a related case is *State ex rel. Danforth* v. *Alford*, 467 S.W.2d 55 (Mo. 1971), holding that the disqualification of the present petitioner from office applied to the entire term for which he had been elected.

ARGUMENT

I.

The petitioner has failed to preserve for review by this Court any claim arising under the Constitution or laws of the United States.

The case disclosed by the opinion of the Supreme Court of Missouri, appended to the petition, is simply one of state procedures for removal of public officers. No question arising under the Constitution or laws of the United States is disclosed there.

The obvious reason is that the petitioner raised no such question before that court. Petitioner's brief in the Supreme Court of Missouri contains six pages of "Points Relied On," with authorities, as is required by the rules of that court. There is not a single federal constitutional citation, nor a single point relating to any federal question.

The Missouri courts have consistently held that points which are not set out in the brief are waived. See, e.g., *Ayres* v. *Keith,* 355 S.W.2d 914 (Mo. 1962).

They also hold that federal constitutional questions are waived unless they are raised at the first opportunity. *Witt* v. *City of Webster Groves,* 383 S.W.2d 723 (Mo. 1968).

Each of the questions set out on pages 3 and 4 of the petition was available at the time of submission of the case to the Supreme Court of Missouri. When a point is ascertainable at the time of submission, it may not be raised for the first time in a motion for rehearing. *Ackerman* v. *Globe-Democrat Publishing Company,* 368 S.W.2d 469 (Mo. 1963), cert.den. 375 U.S. 949. The exception as to the rare case in which the court injects a federal question in its opinion (cf. *Brinkerhoff-Faris Trust and Savings Com-*

pany v. Hill, 281 U.S. 673, 74 L.Ed. 1107, 50 S.Ct. 451 (1930)), has no application here.

The petitioner has not complied with the reasonable procedural requirements of state law in the presentation of federal questions, nor has he sustained the burden imposed by this Court's Rule 23 (1) (f) of showing that he has done so. The petition should be denied for these reasons alone.

II.

The "questions presented" as set out in the petition fail to show any substantial federal question.

1. The sufficiency of pleadings is manifestly a matter for state law. Quo warranto is distinctly a civil action. *State ex inf. Connett* v. *Madget*, 297 S.W.2d 416 (Mo. 1956). The petitioner's criminal citations are not in point. In civil actions the rules of pleading are less rigid than in criminal cases, and the court may permit pleadings to be amended, or may treat them as amended, in order to conform to the proof. See Missouri Supreme Court Rule 55.54, which is essentially the same as Rule 15 (b), F.R.C.P. A party who claims undue surprise should ordinarily move for a continuance to meet the assertedly new allegations. Petitioner makes no showing of having done so.

2. The second "Question" is singularly lacking in merit since the procedure of the Supreme Court of Missouri in cases within its original jurisdiction is essentially the same as that followed by this Court. Cf. *Utah* v. *United States*, ... U.S. ....., 29 L.Ed.2d 279, 91 S.Ct. 1775 (1971), in which a Senior Circuit Judge served as Special Master. As the opinion below shows, the court did not consider itself bound by the Commissioner's findings and made its own independent evaluation (A-4). There is no requirement that a court of the appellate type hear the witnesses

in original actions. *LaBuy* v. *Howes Leather Company,* 352 U.S. 249, 1 L.Ed.2d 290, 77 S.Ct. 309 (1957), reh.den. 352 U.S. 1019, did not purport to establish a constitutional rule, but simply held that under the Federal Rules of Civil Procedure a trial judge should ordinarily hear the evidence himself rather than referring the case to a master. The opinion did not have any application to proceedings in a multi-judge court which normally hears only appeals. The time allowed for oral argument before the court, furthermore, is wholly within the court's discretion. There is, in fact, no requirement that the court hear counsel orally. This Court disposes summarily of many cases within its mandatory appellate jurisdiction.

3. A state is not required to afford trial by jury in civil cases. This has been held in a series of cases going back as far as *Pearson* v. *Yewdall,* 95 U.S. 294 (1877), and is reinforced, *a fortiori,* by the recent opinion of this court in *McKeiver* v. *Pennsylvania,* ..... U.S. ....., ... L.Ed.2d ....., 91 S.Ct. 1976 (1971), holding that a state is not obliged to grant trial by jury in juvenile proceedings. The absence of a requirement of trial by jury applies especially to extraordinary proceedings such as those in quo warranto. 50 C.J.S., Juries, Section 51. The Supreme Court of Missouri held in *State ex inf. McKittrick* v. *Williams,* 346 Mo. 1003, 144 S.W.2d 98 (1940), that the constitutional provisions giving it original jurisdiction in cases involving extraordinary writs contain the fair implication that trial by jury was not to be required in those cases. This was a choice that the state was free to make. The state also has the authority to provide alternate remedies for removing officials for misconduct, as Missouri's courts hold it has done in its constitution and statutes.

4. The opinion below is replete with evidence in support of the findings. The lengthy argument in the petition

simply asks this court to reweigh the evidence which has already been considered by the Commissioner and the court below, and whose respective findings concur. This is clearly out of order. The petition admits (p. 23) that the petitioner did not enforce gambling laws. There is no constitutional obligation on the state court to accept his argument that these laws were unimportant.

The factual support for a finding of misconduct by a state officer is distinctly a state matter. There is no violation of the petitioner's substantive or procedural rights such as to justify this Court's interposition.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

JOHN C. DANFORTH
Attorney General
Supreme Court Building
Jefferson City, Missouri 65101
CHARLES B. BLACKMAR
Special Assistant Attorney General
7305 Maryland Avenue
St. Louis, Missouri 63130
Attorneys for Respondent